ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

No. 87-6325

November Term, 1987

Donald Ray Perry, Petitioner,

versus

William Leeke, Commissioner, South Carolina Department of Corrections, and the Attorney General of the State of South Carolina, Respondents.

On Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY DENIED THE PETITION FOR A WRIT OF HABEAS CORPUS WHERE THE RECORD REVEALS THAT THERE WAS NO PREJUDICE FROM ONE BRIEF SEQUESTRATION OF THE PETITIONER FROM HIS COUNSEL DURING A LENGTHY TRIAL BETWEEN HIS DIRECT AND CROSS-EXAMINATION?

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The Respondents, above named, hereby make a Brief in Opposition to the Petition for a Writ of Certiorari and request that the Petition be denied.

CITATION TO OPINION BELOW

The opinions relevant to the case are Donald Ray Perry v. William D. Leeke, et al., 832 F.2d 837 (4th Cir. 1987) (en banc) set forth in the Appendix at C.1. The Order of the Honorable C. Weston Houck, United States District Judge, is unpublished and styled Perry v. Leeke, C/A No. 3:85-2992-2, filed June 26, 1986, and set forth in the Appendix at B.1. The relevant opinion of the South Carolina Supreme Court is reported at State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983), and set forth in the Appendix at A.1. Certiorari was previously denied in this Court. Donald Ray Perry v. South Carolina, 461 U.S. 908 (82-6336) (April 25, 1983).

JURISDICTION

This matter comes before this Court pursuant to a Petition for a Writ of Habeas Corpus challenging a state court criminal conviction pursuant to 28 U.S.C. § 2254. On November 5, 1987, the United States Court of Appeals for the Fourth Circuit entered its judgment denying the request for relief. The Petitioner involves the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the United States Constitution. The statutory provisions involved are 28 U.S.C. § 2254.

STATEMENT OF THE CASE

A. Statement of the Proceedings.

This matter arises from the Petition for Certiorari by Petitioner Donald Ray Perry from the en banc decision of the Fourth Circuit holding that he was not prejudiced by the sequestration and directing that the Petition for a Writ of Habeas Corpus be dismissed. The Petitioner, Donald Ray Perry, is presently serving a sentence of life imprisonment for murder and kidnapping and thirty years for criminal sexual conduct in the first degree.

On March 5, 1981, Dr. Mary Heimberger had dinner with two friends at a restaurant in Richland County, South Carolina. After having dinner, she left alone in her own automobile. (Tr. pp. 3-6). Dr. Heimberger's associates became alarmed the next day when she failed to report for work. (Tr. pp. 11-21, 31-36). Police officers were notified and began a preliminary investigation of her disappearance. (Tr. pp. 108-111).

Two young boys subsequently found the body of Dr. Heimberger in a wooded area and notified the authorities. (Tr. pp. 157-158, 162, 164). Upon examination of the victim's body, it was found that she had been sexually assaulted, shot to death, and subjected to post-mortem abuse. (Tr. pp. 123-144).

The habeas Petitioner, Donald Ray Perry, was indicted during the August, 1981, term of the Court of General Sessions for Richland County for the offenses of murder, kidnapping, and criminal sexual conduct in the first degree. (Tr. pp. iii-viii). The Solicitor of the Fifth Judicial Circuit, the Honorable James C. Anders, gave timely notice to the petitioner of his intention to seek the death penalty in accordance with South Carolina law. Further, W. Gaston Fairey (present counsel before this Court), and Edward Mullineaux were appointed by the trial court to represent Mr. Perry in his trial.

On September 21, 1981, the trial commenced in Richland County before the Honorable Julius H. Baggett, Circuit Judge of South Carolina. Eight (8) days later, a short recess was held during the Petitioner's testimony that is the primary subject to his appeal. (A. p. 142). On October 2, 1981, the jury found the Petitioner guilty of murder, kidnapping, and criminal sexual conduct.

Pursuant to the South Carolina Death Penalty Act, a bifurcated sentencing proceeding was held. After further testimony was introduced by the defense (Tr. pp. 1196-1212), the jury recommended a sentence of life imprisonment for murder rather than the death penalty. On October 5, 1981, Judge Baggett sentenced the Petitioner to life imprisonment for murder, life imprisonment consecutive for kidnapping, and thirty (30) years consecutive for criminal sexual conduct in the first degree.

The Petitioner timely filed a notice of intention to appeal on October 12, 1981. The Petitioner was represented in the appeal by David W. Carpenter of the South Carolina Commission on Appellate Defense, as well as his trial counsel. Among others, the Petitioner raised the following as an exception:

> I. The trial court erred in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the State right to counsel afforded by the Defense of Indigents Act, when the court denied appellant access to counsel during a recess of court between appellant's testimony on direct examination and cross-examination.

(Tr. p. 1346). The Petitioner raised this issue in his brief to the South Carolina Supreme Court. (Brief of Appellant, pp. 1-6). On January 3, 1983, the South Carolina Supreme Court issued its opinion, written by Associate Justice Littlejohn, upholding the conviction rejecting the argument of the Petitioner. State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983). (A. pp. 29-33). The Petitioner made a petition for certiorari to the United States Supreme Court on this issue. On April 25, 1983, the Court issued its order denying the petition for certiorari. Donald Ray Perry v. South Carolina, No. 82-6336, 461 U.S. 908, 103 S.Ct. 1881, 76 L.Ed.2d 811 (1983).

On November 11, 1985, the Petitioner, with the assistance of present counsel, made a petition for writ of habeas corpus contending that he was denied the effective assistance of counsel between the Petitioner's direct and cross-examination at trial when the Court ordered that he was not to confer with counsel during a fifteen-minute break in the court proceedings. (A. p. 5). The Respondents made their return and a motion for summary judgment on December 20, 1985. (A. p. 8). On May 29, 1986, the Honorable Robert S. Carr issued his report and recommendation that the writ

[of habeas corpus] issue unless the State [of South Carolina] elects to retry the Petitioner within a reasonable period of time." (A. p. 21). In his report, Magistrate Carr opined that he was bound by this Court's decision in U.S. v. Allen, 542 F.2d 630 (4th Cir. 1976), and Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982). The Respondents made written objections to various factual findings of the report. (A. p. 22). On June 26, 1986, the Honorable C. Weston Houck issued his order rejecting the objections of the Respondents and conditionally ordering that the writ of habeas corpus shall issue. (A. p. 25). (App. p. B.1.).

On November 5, 1987, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and remanded the case with directions that the Petition be dismissed. In its decision, authored by Judge Wilkinson, the Court held that Perry was not entitled to the requested relief because, under the unique facts of the case, prejudice was not shown under the standard enunciated by this Court in Strickland v. Washington, 466 U.S. 668 (1984). In particular, it held that there was no reason to believe that any communication which might have occurred during the brief recess at issue could have altered Perry's performance on cross-examination. (App. p. C.15). Further, the Court stated that "there is no contention that his counsel failed to explain his rights on cross-examination to him during the many recesses in which consultation was allowed, including the luncheon recess called immediately prior to his taking the witness stand, nor has it been argued that anything occurred during his direct examination that would have made a "refresher course necessary." (App. p. C.15). The Court also noted the

testimony against Perry as being overwhelming and the representation of his counsel team as being vigorous. (App. p. C.17). It concluded that these factors persuaded the Court "that the possibility of prejudice is utterly remote." (App. p. C.18). Therein, it concluded that his request for relief was without merit.

B. Statement of the Facts.

The critical issue in this case concerns whether a brief recess between the direct and cross-examination during which counsel was denied access to his client entitles him to a new trial. The record before this Court reveals that the trial began with motions and jury selection on September 21, 1981, and concluded on October 5, 1981. During this lengthy trial, the record reveals that there were eleven recesses during the testimony portion of the trial prior to the Petitioner's testimony on September 29, 1981. (Tr. pp. 86, 176, 213, 274, 344, 352, 421, 470, 517, 585, 663). Included in these recesses were an overnight recess from September 25-26, 1981 (Tr. p. 176), a weekend recess from September 26-28, 1981 (Tr. p. 352), and an overnight recess from September 28-29, 1981 (Tr. p. 585). Of critical importance, there was a luncheon recess just prior to the Petitioner's testimony on September 29, 1981. It is uncontested that there was no restriction on counsel's access to his client during this entire period.

On September 29, 1981, the Petitioner was called to testify. (A. pp. 34-191). He was the third witness called by the defense. His testimony began immediately after a luncheon recess where his access to counsel was unrestricted. (A. p. 34). During his direct testimony, a recess was held at the request of a juror. (A. p. 76). It is uncontested that counsel had access to his client during this recess.

After counsel completed his direct examination of the Petitioner, a recess was ordered for fifteen minutes. (A. p. 142). After the recess was concluded, trial counsel made the following motion to the Court:

> Mr. Fairey: Your Honor, we have an additional motion for a mistrial on the grounds that we are being denied -- Mr. Perry is being denied adequate representation of counsel because I understand the Court has ordered the attorneys not to speak with him during this break.
>
> The Court: During the last break, that is true. Mr. Perry has testified on direct examination. He was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross examination. I felt in fairness to the State that was proper and I accept full responsibility for it. Your motion is denied.
>
> Mr. Fairey: I would like the record to also reflect that such instructions have not been made for any other witness in this trial.
>
> The Court: That is correct. I'm not sure that situation has arisen up to this point in time.
>
> Mr. Fairey: I would also --
>
> The Court: And which it would not matter because no one is on trial but Mr. Perry and that motion would not apply. The Sixth Amendment rights apply only to one who is on trial.
>
> Mr. Fairey: I agree with you. But I would like the record to reflect that this is the only instance during the trial that this has been done and in several cases there have been breaks between direct and cross-examination.
>
> The Court: I'm not sure. I recall one other instance but I can't say exactly what it was. But your motion is noted, sir, and it is denied.

(A. p. 144). The Petitioner completed his testimony that afternoon. (A. p. 190)

Immediately after his testimony, an overnight recess was held during which time the Petitioner had access to counsel. (A. pp. 190-191). The record reflects that the defense further presented seventeen (17) additional witnesses during the guilt phase portion of his trial. (Tr. pp. 820-1135). During the presentation of these witnesses,

the following recesses occurred in which counsel's access to his client was not restricted: the overnight recess at the conclusion of Mr. Perry's examination (A. p. 190), a fifteen-minute recess on September 30, 1981, at the conclusion of Miriam Perry's direct testimony (A. p. 192), a lunch recess at the conclusion of Miriam Perry's testimony (A. p. 194), a brief recess at the conclusion of John Shupper's testimony (A. p. 195), an overnight recess at the conclusion of Dr. Follingstad's testimony to October 1, 1981 (A. p. 196), a brief recess for fifteen minutes at the conclusion of Dr. Morgan's testimony on October 31, 1981, at the request of counsel Fairey (A. p. 197). On October 1, 1981, the defense rested its case. (Tr. p. 1135).

During the reply testimony, there was also a brief recess waiting for a witness (Tr. p. 1158), and a lunch recess (A. p. 199). On October 1, 1981, the testimony was completed and the defense made its motions. (Tr. p. 1182). At the conclusion of these motions, there was an evening recess until the morning of October 2, 1981. (A. p. 201). After the arguments, charges, and deliberations had begun, an evening recess was held until October 3, 1981 (Tr. p. 1336).

On Saturday, October 3, 1981, the jury returned its verdict at 3:12 P.M. The jury convicted the Petitioner of murder, kidnapping. and criminal sexual conduct. (Tr. p. 1337). The jury was polled and advised that the penalty phase would begin Monday, October 5, 1981. (A. p. 202). Counsel for the Petitioner moved for a judgment n.o.v., or new trial, "based upon our lack of being able to have access to the defendant during the break taken during the Court proceedings." (A. p. 204). Pertinent inquiry was as follows:

The Court: I don't think it's necessary. I will state for the record as a stipulated matter if you care to that Mr. Mullineaux did attempt to talk to the defendant during the break and he was not allowed to because of the order that I issued.

Mr. Fairey: I would also like to put on the record that we were not notified as to the order prior to the order being issued. We didn't learn of that until we attempted to talk to the defendant.

The Court: True.

Mr. Fairey: We'd also like the Court to acknowledge that we would not have tried to do anything improper with the defendant.

The Court: I'm quick to acknowledge that. No question about that.

Mr. Fairey: Yes, sir, and other than answer his questions and also to make sure he understood his rights on cross-examination.

The Court: I'm sure you gentlemen realize why I did it. Well, I don't mean for you to acknowledge it. I've already stated why I did it so you have that on the record. That's all right.

(A. p. 204). The penalty phase testimony was begun on October 5, 1981. The Petitioner presented six (6) witnesses in mitigation of punishment. Counsel further pointed out to the Court eighteen (18) witnesses who had agreed to come to court and would have presented similar mitigation evidence. (Tr. p. 1213). After jury charges, the jury issued its recommendation of life imprisonment for murder. The trial court then sentenced the Petitioner to thirty (30) years imprisonment for criminal sexual conduct, life for kidnapping, and life for murder, consecutive to each other. The sentence for kidnapping was vacated on state law grounds on appeal, while the conviction was affirmed.

REASONS FOR DENYING THE WRIT

Respondents submit that the decision of the United States Court of Appeals, en banc, is entirely consistent with this Court's prior precedents in Geders v. U.S., 425 U.S. 80 (1976); Strickland v. Washington, 466 U.S. 668

(1984), and U.S. v. Cronic, 466 U.S. 648 (1984). The Petitioner relies upon Geders for support of his position. In Geders, however, the Court expressly reserved the question of whether a defendant's rights would be violated by an order preventing consultation "during a brief routine recess during the trial day." Geders v. U.S., 425 U.S. at 89 n. 2.

The Petitioner relies upon the position that other circuits have taken a different position than the Fourth Circuit to the applicability of the Strickland prejudice standard on similar cases. We submit that the cases cited by the Petitioner are distinguishable on the facts from this case. In U.S. v. Bryant, 545 F.2d 1035 (6th Cir. 1976), the Court applied the per se rule of Geders to a one hour lunch recess during which consultation is anticipated rather than the unexpected short break involved in this case. In Crutchfield v. Wainwright, 803 F.2d 1103 (11th Cir. 1986) (en banc), the Court also involved a break in the examination that may have extended to a two-hour lunch break and determined that there was no deprivation of a fair trial in the embargo order since the record did not reflect a desire by the defendant to consult nor an objection by counsel (a particularized showing of prejudice). In Mudd v. U.S., 798 F.2d 1509 (D.C. Cir. 1986), the Court was faced with an issue concerning a weekend recess from Friday to monday that was similar to the overnight recess in Geders. Similar, the Eighth Circuit decision in U.S. v. Vesaas, 586 F.2d 101, 102, n. 2 (8th Cir. 1978), only addressed in dicta a recess of unknown duration in a case which was dismissed for insufficiency of the evidence. Consistent with the decision of the Fourth Circuit is U.S. v. Dilapi, 651 F.2d 140 (2nd Cir. 1981), in which the Court refused to reverse

where a defendant was barred from consulting with his counsel during a five-minute recess in the midst of his cross-examination after finding that there was "not even a remote risk of actual prejudice." Dilapi was relied upon by the South Carolina Supreme Court in the instant case.

In this case, the South Carolina trial judge ordered that a recess be held for fifteen (15) minutes between the Petitioner's direct and cross-examination. (A. p. 144). During the recess, counsel were denied access to the Petitioner because the trial court ordered that counsel could not speak with the Petitioner during the short break because "he was not entitled to be cured or assisted or helped approaching his cross-examination." (A. p. 144). Trial counsel objected after the recess and moved for a mistrial on the ground that he was "being denied adequate representation of counsel." (A. p. 144). After the verdict was rendered, counsel, in his motion for a new trial, stated that co-counsel had attempted to talk to defendant during the break and that was the first they heard about the order. Counsel stated that their reason for the contact during the break was not to "have tried to do anything improper with the defendant ... other than answer his questions and also to make sure he understood his rights on cross-examination." (A. p. 204). The trial court and the South Carolina Supreme Court rejected the assertions of Petitioner's counsel. (A. pp. 204, 29-33). Because the circumstances surrounding the issuance of the order conclusively demonstrate that no harmful error took place, we submit that the Circuit Court's analysis was constitutionally correct.

In Geders v. U.S., supra, the United States Supreme Court held impermissible a sequestration order which prevented a criminal defendant from communicating with

counsel during a seventeen (17) hour overnight recess. It held that a trial judge's broad power to control the progress and shape of a trial did not include the power to prohibit consultation between a criminal defendant and his attorney for so long a period. It reached this result without requiring the defendant to make a preliminary showing of prejudice as a result of that order. Geders, therefore, holds that a sequestration order permitting an overnight hiatus in communication between a lawyer and his client is impermissible per se, and requires automatic reversal. The Court, however, expressly limited its holding to restrictions on attorney-client communication of overnight duration, as opposed to those of significantly shorter duration, such as brief routine recesses in the trial day. Geders, 425 U.S. 89 n. 2.

Subsequent to Geders, this Court in Strickland and Cronic held that ineffective assistance of counsel at trial does not require reversal of a conviction unless the deficient performance of counsel was sufficiently prejudicial. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. As the Fourth Circuit held, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696. Clearly, the label as to whether it is a denial of counsel versus ineffective assistance of counsel should not be the determinative factor.

Strickland and Cronic held that because the purpose of the Sixth Amendment "is simply to ensure that criminal defendants receive a fair trial," id. at 689, the

analysis of claims alleging violations of the right to counsel always focuses on prejudice. Automatic reversal is warranted only where prejudice can be presumed:

> [T]he right to the effective assistance of counsel is not recognized for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated .... There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.

Cronic, 466 U.S. at 658. See also Strickland, 466 U.S. at 692.

In Cronic and Strickland, the petitioners contended that they had been deprived of their Sixth Amendment rights because they had been represented by allegedly incompetent or inadequate counsel. Such a deprivation is far more likely to have a prejudicial effect than the deprivation at issue here. Perry had very competent attorneys with whom he was able to confer during an overnight recess the night before and during a luncheon recess immediately prior to his testimony. It would make little sense to maintain a per se rule of reversal for a brief restriction on consultation, but to inquire into prejudice if Perry had been represented incompetently throughout. The existence of prejudice from a restriction such as this one is necessarily tied to the surrounding facts; it cannot be and will not be presumed to have so infected the entire trial that no course other than reversal of this conviction is conceivable.

The quality of Perry's representation belies the need for a rule to automatic reversal suggested in the Petition. He was represented by two attorneys, Mr. Fairey and Mr. Mullineaux, who were present and active throughout

the case. The defense presented some twenty-seven witnesses in Perry's behalf. Cross-examination of government witnesses was vigorous throughout. In all different stages of the trial -- from jury selection through closing argument, from the guilt phase through the sentencing phase -- this defendant was well served and ably represented. The trial judge commended Perry's counsel on the record for their competency and zeal, adding that he hoped "that all my lawyers would be equally prepared and dedicated to their cases." It would be far too simplistic to equate this case with those cases where judgment was rendered on an uncounselled defendant and to lump them all together under a "right to counsel" rubric which requires automatic reversal. The law must be sensitive to matters of degree, here the fact that for all but the tiniest fraction of trial time defendant consulted with counsel and was championed by counsel in the best traditions of adversary justice.

Because the state trial proceedings met the requirements of Geders, the Fourth Circuit holding is consistent with that decision. This was a lengthy trial, and there were eleven different recesses prior to Perry's testimony, including two overnight recesses, one weekend recess, and significantly, a luncheon recess immediately before Perry took the stand. At each of these recesses, there was no restriction on Perry's access to his counsel. During Perry's direct examination, a recess was also held at the request of a juror; Perry was not barred from access to counsel at that time either. After Perry's testimony, there were recesses of varying durations -- fifteen minute recesses, luncheon recesses, and overnight recesses -- during all of which Perry and his counsel were able to consult. Thus, the bar order at issue here applied to but one of many recesses, and a brief one at that.

The restriction at issue in Geders posed so great a danger to a fair trial that prejudice could be presumed. Its duration was extreme (a seventeen-hour overnight recess) and it occurred at a time when defendant and his counsel could have expected to confer. In contrast, the restriction here was not only brief, but occurred during an unscheduled recess during trial. Perry and his counsel had no entitlement to a recess at this time and had no reason to expect a recess to occur by chance between direct and cross-examination. In a majority of instances, cross-examination of a witness follows direct examination without a break. See Geders, 425 U.S. at 90. Because Perry had no entitlement to this recess, the dissenters' speculation on what valuable services counsel may have rendered is simply misdirected. New ideas or strategies might occur to a defendant or his counsel at any time during a trial, but there is no right to halt the proceedings in order to consult. To reverse automatically a conviction because of an absence of consultation during one brief, fortuitous recess in a trial which spanned nearly two weeks would be to confer a benefit upon a per se approach is thus apparent. The proper inquiry is whether this trial was unfair, whether this defendant suffered prejudice, whether this conviction was infirm -- in short, whether justice was done in this case.

In summary, we submit that the decision of the Fourth Circuit rested upon sound analysis of the decisions of this Court. The decision reviewed the conviction under a "fundamental fairness" analysis that was appropriate in its review as a habeas corpus court. The per se rule of automatic reversal pressed by the Petitioner is clearly inappropriate in this case where the totality of the

circumstance reflects an "utterly remote" risk of prejudice. His request must be denied.

CONCLUSION

For the reasons set forth herein, we request that the Petition be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

By: Donald J. Zelenka

March 2, 1988
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AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and ten copies of Brief in Opposition to the Petition for Certiorari in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 2nd day of March, 1988.

Donald J. Zelenka

SWORN to before me this

2nd day of March, 1988.

Notary Public for South Carolina (LS)
My Commission Expires: 4/1/92.